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## ARIZONA ATTORNEY GENERAL

October 28, 1971

DEPARTMENT OF LAW LETTER OPINION NO. 71-30-L (R-92)

REQUESTED BY: FRANKLIN J. STOWELL  
Superintendent of Banks

QUESTION: Does the following "automatic termination" provision effect termination in a manner inconsistent with the language contained in A.R.S. § 6-709.B?

"I (the 'debtor') agree that if I fail to make six consecutive payments to (name of debt management company) provided for in this contract, such failure shall constitute the termination by me of this contract."

ANSWER: Yes.

A.R.S. § 6-709.B is the applicable provision of Arizona's statutes, and it reads in part: "... Termination shall only be upon a five-day notice to the other party."

The statutes are silent with regard to the form and manner of giving notice; however, they are loud and clear to the effect that a five-day notice to the other party must precede termination.

Necessarily, the above-quoted termination provision would be effective without the "debtor" having given any notice. Assume, for purposes of illustration, that a "debtor" agrees to make payments to a debt management company in the amount of \$100.00 per month beginning May 25, 1971, until the total amount of the outstanding bills are paid, and November 25, 1971, arrives and no payments have been made by the "debtor" pursuant to his contract with the debt management company.

Consistent with the above-quoted termination provision, the contract would automatically terminate on November 25, 1971; however, no notice would have been given as required by law. On November 24, 1971, theoretically, the debt management company would not know whether or not the "debtor" would terminate. The debt management company would know only that the "automatic termination" provision might take effect.

It should be noted also that the Legislature built into the statute a "penalty" provision effective when a "debtor" terminates a contract executed pursuant to A.R.S. § 6-701, et seq. A.R.S. § 6-709.B reads in part: ". . . The licensee shall retain the retainer fee where the termination is by the debtor."

Realizing the consequence attached to a termination by a "debtor"--operation of the legislatively imposed "penalty" provisions--it is our opinion that an "automatic termination" provision, operative without a "debtor's" giving a five-day notice of termination, is contrary to law.

Accordingly, it is our opinion that the above-quoted "automatic termination" provision would effect termination in a manner inconsistent with the language contained in A.R.S. § 6-709.B.

However, we envision the occurrence of situations in which a "debtor" agrees to make payments to a debt management company, and, without giving any notice of termination to the debt management company, stops making such payments. In such situations, consistent with the foregoing opinion expressed herein, the debt management company may choose only to either:

1. Terminate the contract, after giving the required five-day notice, and refund the retainer fee; or
2. Continue indefinitely to maintain the "debtor's" inactive account.

In view of the possibility of the occurrence of such situations, we think it is reasonable, and consistent with the express legislative intent that a "penalty" be imposed under certain circumstances, to assume that the Legislature contemplated that the parties may contract with regard to a form and manner of giving the required five-day notice of termination. Otherwise, a "debtor" could stop making payments, give no notice of termination to the debt management company; and, notwithstanding the "debtor's" termination, for all practical purposes, the debt management company would not be entitled to avail itself of the "penalty" provision enacted by the Legislature.

Accordingly, it is our opinion that a contract executed between a debt management company and a "debtor" pursuant to A.R.S. §§ 6-701, et seq., may provide for a form and manner of giving the required five-day notice of termination to the other party (e.g., I (the "debtor") agree that if I fail to make six consecutive payments to (name of debt management company) provided for in this contract, such failure shall constitute notice by me to the company of a five-day notice of termination of this contract).

Such provision, however, must be reasonable. In our opinion, a provision which either is unduly restrictive or works a hardship on a "debtor" (e.g., excusable neglect) is contrary to the legislative purpose.

Respectfully submitted,

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*by F.S.*

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